

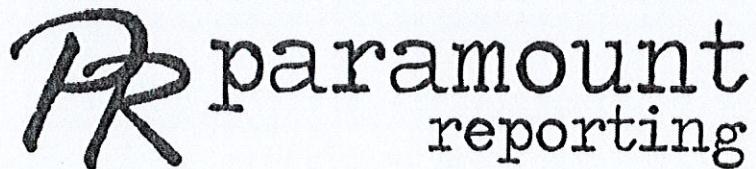
*American Zurich Ins. Co. and Zurich American Ins. Co. v.  
J. Crisman Palmer and GPNA*

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*William P. Fuller  
December 20, 2022*

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EXHIBIT

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<p>1 faith cases in South Dakota and what you've done.</p> <p>2 A All right.</p> <p>3 Q Have you defended bad faith cases in which you've</p> <p>4 submitted an answer without including an affirmative</p> <p>5 defense?</p> <p>6 A Yes, I have.</p> <p>7 Q And why would you do that?</p> <p>8 A Because there was no applicable affirmative defense to</p> <p>9 assert.</p> <p>10 Q Have you defended bad faith cases without pursuing</p> <p>11 offensive discovery?</p> <p>12 A I have.</p> <p>13 Q Again, why would you strategically do that?</p> <p>14 A In many instances, if I get a bad faith case that comes</p> <p>15 in and I review it, I review the file, the claim file,</p> <p>16 and the available information, and I can see at the</p> <p>17 outset that this is not good, that ultimately if this</p> <p>18 were tried, we're going to lose and we could lose big,</p> <p>19 and my goal at the outset is to try to get it settled</p> <p>20 as quickly as possible. And in that situation, I will</p> <p>21 talk to plaintiffs counsel about mediation and see if</p> <p>22 we can mediate it as quickly as possible; and if for</p> <p>23 some reason mediation is not acceptable to plaintiffs</p> <p>24 counsel, to try to get it settled without a mediator.</p> <p>25 And sometimes I'm successful in doing that. But I know</p>	<p>1 to compel, ends up paying attorneys' fees -- the</p> <p>2 plaintiffs attorneys' fees on the discovery issue, and</p> <p>3 in my opinion -- and this is, you know, not a</p> <p>4 mathematical computation, but I think your stock, my</p> <p>5 stock goes down in front of that judge if I fight what</p> <p>6 I know is a losing battle on discovery.</p> <p>7 BY MR. SUTTON:</p> <p>8 Q Bill, I'm going to hand you what's previously been</p> <p>9 marked as <u>Exhibit 58</u>, and I'm going to represent to you</p> <p>10 that this is a draft answer that -- or excuse me. Let</p> <p>11 me start over. I'm going to represent to you that this</p> <p>12 is a proposed amended answer that was filed in the</p> <p>13 Leichtnam bad faith case, and what I'd like you to do</p> <p>14 is to turn to page 9 of that document, 9 in the bottom</p> <p>15 numbers, 10 in the top numbers.</p> <p>16 A So turn to page 9.</p> <p>17 Q Correct, where it says "Separate and Affirmative</p> <p>18 Defenses." Are you there?</p> <p>19 A Right.</p> <p>20 Q Now, there is a proposed affirmative defense,</p> <p>21 paragraph 1, Failure to Exhaust Administrative</p> <p>22 Remedies. I want to ask you, based on your experience</p> <p>23 in defending bad faith cases, as well as your knowledge</p> <p>24 of the defense of the underlying comp case, once the</p> <p>25 settlement agreement was approved by the department in</p>
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<p>1 that if I don't get it settled right away, that in most</p> <p>2 instances, as more discovery -- and discovery is</p> <p>3 extensive in bad faith in South Dakota. It takes a lot</p> <p>4 of time, and it costs a lot of money. And usually it</p> <p>5 doesn't help me; it helps the plaintiff. And so at the</p> <p>6 end, we spend a lot of money on discovery, and we end</p> <p>7 up paying even more money trying to get it settled a</p> <p>8 year and a half after the lawsuit has been started.</p> <p>9 Q Based on your experience in defending bad faith cases</p> <p>10 in front of the federal district court judges in</p> <p>11 South Dakota, would you have any concerns in pursuing</p> <p>12 offensive discovery if your client has not responded</p> <p>13 fully to the discovery requests from the defendant and</p> <p>14 is facing a motion to compel?</p> <p>15 MR. HOYT: Objection. Vague, incomplete.</p> <p>16 THE WITNESS: Yes, I would have concerns. My</p> <p>17 concern is that I know the federal judges are very</p> <p>18 aggressive in compelling the insurance companies to</p> <p>19 open their books, so to speak, and provide</p> <p>20 broad-ranging information and documents, and I know,</p> <p>21 and you can read numerous decisions from the federal</p> <p>22 magistrates and the federal judges, where the judges</p> <p>23 are not favorably disposed to the insurance company's</p> <p>24 withholding of documents or information. And so, in</p> <p>25 many instances, the insurance company loses the motion</p>	<p>1 the Leichtnam comp case, do you believe that there was</p> <p>2 any additional steps that the plaintiff needed to do to</p> <p>3 exhaust their administrative remedies before pursuing a</p> <p>4 bad faith claim?</p> <p>5 MR. HOYT: Objection. Foundation, calls for legal</p> <p>6 conclusion.</p> <p>7 THE WITNESS: I don't think there was anything</p> <p>8 further that needed to be done.</p> <p>9 BY MR. SUTTON:</p> <p>10 Q Why do you say that?</p> <p>11 A Because --</p> <p>12 MR. HOYT: Same objection.</p> <p>13 THE WITNESS: Because the settlement agreement --</p> <p>14 and more importantly, which was approved by the</p> <p>15 Department of Labor -- in essence, is a final judgment</p> <p>16 and, in essence, is an exhaustion of administrative</p> <p>17 remedies.</p> <p>18 BY MR. SUTTON:</p> <p>19 Q In order for there to be an exhaustion of</p> <p>20 administrative remedies, do you have an opinion as to</p> <p>21 whether there must be a statement in the settlement</p> <p>22 agreement that benefits were wrongfully denied?</p> <p>23 MR. HOYT: Same objections.</p> <p>24 THE WITNESS: I don't believe that's necessary.</p> <p>25</p>

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<p style="text-align: right;">Page 45</p> <p>1 BY MR. SUTTON:</p> <p>2 Q Have you ever seen a settlement agreement signed in a 3 comp case, in your experience, either defending bad 4 faith cases or defending comp cases, where there was an 5 acknowledgment that benefits were wrongfully denied?</p> <p>6 A Not in my experience.</p> <p>7 Q Would you anticipate ever recommending your client 8 agree to that language?</p> <p>9 A No.</p> <p>10 Q Why not?</p> <p>11 A Well, it's admitting that you've basically engaged in 12 wrongful conduct.</p> <p>13 Q Are you aware of bad faith cases that have proceeded in 14 South Dakota based upon a settlement agreement approved 15 by the Department of Labor rather than an adjudication 16 following a hearing?</p> <p>17 A Run that question by again.</p> <p>18 Q Yeah. Do you have knowledge of bad faith cases in 19 South Dakota that have been filed when there's only 20 been a settlement of the workers' compensation claim 21 rather than a hearing in which the Department of Labor 22 determines that benefits were denied?</p> <p>23 A Yes. I'm aware of cases. Correct.</p> <p>24 Q And is that an unusual proposition, that you see a 25 settlement and then the bad faith claim?</p>	<p style="text-align: right;">Page 47</p> <p>1 MR. HOYT: Same objections.</p> <p>2 BY MR. SUTTON:</p> <p>3 Q What's that opinion?</p> <p>4 A The release --</p> <p>5 MR. HOYT: Same objections.</p> <p>6 THE WITNESS: The release would not have been a 7 valid defense in the bad faith lawsuit.</p> <p>8 BY MR. SUTTON:</p> <p>9 Q Why do you say that?</p> <p>10 A Because it was never the understanding in the work comp 11 proceeding that Mr. Leichtnam was releasing a potential 12 subsequent bad faith lawsuit. That was never my 13 intention from the outset, and Denny Finch had concerns 14 about language that could be construed in that way and 15 wanted that language removed. Which I did.</p> <p>16 Q The fifth affirmative defense, statute of limitations, 17 identified on page 10 of Exhibit 58. Do you know, off 18 the top of your head, Bill, when the limitations period 19 commences or accrues in a bad faith case based upon 20 denial of work comp benefits?</p> <p>21 MR. HOYT: Objection. Incomplete, vague.</p> <p>22 THE WITNESS: I believe it would commence at the 23 time of the wrongful denial.</p> <p>24 BY MR. SUTTON:</p> <p>25 Q Do you know what the limitations period is governing</p>
<p style="text-align: right;">Page 46</p> <p>1 A No.</p> <p>2 Q I'd like you to turn to page 10 of Exhibit 58, please, 3 Bill. There is a third affirmative defense, 4 res judicata. Do you see that?</p> <p>5 A I do.</p> <p>6 Q Based upon your knowledge of the work comp settlement 7 and your knowledge in defending bad faith cases, do you 8 have an opinion as to whether there was a successful 9 res judicata defense that could be asserted in this bad 10 faith case?</p> <p>11 MR. HOYT: Objection. Foundation, calls for legal 12 conclusion.</p> <p>13 THE WITNESS: Yes.</p> <p>14 BY MR. SUTTON:</p> <p>15 Q What is that opinion?</p> <p>16 A Res judicata did not apply. The issues in the work 17 comp case are different from the issues in the bad 18 faith litigation.</p> <p>19 Q The fourth affirmative defense, release. Based upon 20 your work in defending the work comp case, as well as 21 your other work in other bad faith cases, do you have 22 an opinion as to whether release would have been a 23 successful affirmative defense in this case, the bad 24 faith case?</p> <p>25 A I do.</p>	<p style="text-align: right;">Page 48</p> <p>1 bad faith cases in South Dakota?</p> <p>2 A I believe it's six years.</p> <p>3 Q Now, when the bad faith case was first commenced, did 4 you have a phone call with Cris Palmer?</p> <p>5 A I did.</p> <p>6 Q And do you recall -- well, what do you recall being 7 discussed during that phone call? Let's do it that 8 way.</p> <p>9 A I think I said to him that, you know, obviously it's 10 his call, but advice of counsel would not be a good 11 defense in the bad faith.</p> <p>12 Q Why did you communicate to Attorney Palmer that you did 13 not think advice of counsel would be a good defense?</p> <p>14 A Because that would open up all of my communications to 15 Zurich about the medical issue and my concerns about 16 the denial of medical benefits.</p> <p>17 Q Do you recall anything else from that discussion with 18 Attorney Palmer?</p> <p>19 A I really don't. I probably talked to him about 20 something else, but I can't recall what it was.</p> <p>21 Q Do you recall having any other conversations with 22 Attorney Palmer at any time about the bad faith case?</p> <p>23 A Well, I recall during the bad faith mediation -- 24 apparently, there was a mediation that occurred, you 25 know, relatively soon after the lawsuit was started,</p>